



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Appeal 208 'B' of 2008

REPUBLIC.....APPELLANT

VERSUS

SIMON MULI NGUMU.....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate

S.A. Okato Ag. PM delivered on 30/9/2008 in Kangundo Criminal Case No. 60 of 2006)

J U D G M E N T

This is an appeal by the State from the acquittal of the Principal Magistrate's Court at Kangundo. The grounds of appeal by the State are as follows:-

- 1. The learned trial magistrate erred in law and in fact in acquitting the respondent when the prosecution has tendered sufficient evidence disclosing a *prima facie* case against the respondent; hence the respondent ought to have been put on his defence.**
- 2. The learned trial magistrate erred in law and in fact in introducing extraneous matters which matters grossly misdirected his mind to come to a wrong conclusion in the criminal case.**
- 3. The learned trial magistrate erred in law and in fact in holding that the evidence tendered by the prosecution to prove ownership of the parcel of land in issue as sufficient thus misdirected himself and reached the wrong conclusion.**

At the hearing of the appeal, the learned State Counsel, Mr Mukofu, submitted that the respondent was charged with assault of the complainant causing actual bodily harm. Counsel submitted that, in the judgment, the magistrate initially found that the respondent assaulted the complainant, but later found that there was extreme provocation. Counsel also submitted that the respondent was not put on his defence.

Learned counsel for the respondent, Ms. Mburu, submitted that the decision of the subordinate court was correct. In counsel's view, there were serious contradictions in the prosecution case. In addition, there was evidence of extreme provocation. Counsel argued that PW3 did not witness the assault. Therefore, the allegation of assault was hearsay. In any event, an appeal by the State can only be sustained on issues of law. Reliance was placed on **Republic –vs- Paul Kobia (2011) e KLR.**

This being a first appeal, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions and inferences – See **Okeno –vs Republic (1972) EA 32**.

I have perused the proceedings and judgment. Though the learned State Counsel and the grounds of appeal indicate that the appellant was not put on his defence, he was actually put on his defence. He had asked for a fresh trial after the case was taken over by another magistrate, but that request was declined. He consequently gave unsworn testimony and called two witnesses Ruth Mutuku DW2 and Jackson Mutuku DW3. Therefore, it cannot be correct to say that he was not put on his defence.

The eye witness to the alleged assault of the complainant (PW1) was D N (PW3) aged 14 years. She stated that she saw the respondent sitting on the complainant. She was the daughter of the complainant. Her evidence was not controverted in cross-examination. The complainant was also injured, which evidence was not controverted. PW6 Agnes Nzuki, a Clinical Officer examined the complainant on 28/1/2006. The left side of the head was swollen. The left eye was red. He had a wound on the chin and two teeth were loose. All these might be evidence of an assault, or evidence of a fight or a struggle.

The respondent on his part, testified that the complainant was the aggressor. He did not say that he attacked the complainant because of provocation. His evidence was that he was provoked and also that he was attacked by the complainant. He stated:-

“I saw the complainant approaching me. I had a boundary dispute with him. I had even complained to the lands office. He came with a jembe and used it to hit the wire fence and dared me to move near so that he could show me that the land was his. I told him the land was mine. He jumped the wire after he damaged it. He aimed the jembe at me and I held it. He fell me down and started pulling my testicles.”

At page 4 of the judgment the learned trial magistrate stated as follows:-

“The complainant’s evidence was sufficiently corroborated by Joseph Mutiso (PW2) and D N (PW3) and Even Meshak Kieti (PW4). These were eye witnesses whose evidence was direct and highly reliable. Even the P3 form (exhibit 3) shows that the complainant suffered the injuries aforesaid on 28/1/06. I therefore find that the accused assaulted the complainant and occasioned him actual bodily harm.”

Then the learned magistrate went on to evaluate whether that harm was unlawful. He came to the conclusion that there was extreme provocation, and thus the assault was not unlawful. He acquitted the respondent.

From the grounds of appeal filed, the only issue of law is whether extreme provocation can make an assault justified. In my view, provocation can vitiate a criminal offence. It can also mitigate a criminal offence – See **Chivasi & Another –vs- Republic (1990) KLR 529**. There was indeed evidence before the magistrate that provocation might have been there. There was evidence also regarding a dispute to land. There was also evidence of a struggle. I find nothing to convince me that the learned magistrate took into account extraneous matters on the land ownership dispute. That issue of a dispute was the evidence given on both the prosecution and defence side. In my view, the finding of the magistrate that there was provocation was a finding of fact, not subject to appeal by the State. The finding that provocation can vitiate the criminal liability is a question of law. The injuries could have been caused in a struggle, which was provoked by the complainant. The trial magistrate could therefore make the finding which he made. Making such a finding was not a misdirection of law, nor was it unlawful.

In my view, the State has not raised a point or points of law that would convince an appellate court to interfere with the findings and decision of the learned trial magistrate.

Consequently, it is my finding that the appeal has no merits. I dismiss the same.

Dated and delivered at Machakos this 13th day of June 2012.

George Dulu
Judge

In presence of:-

Ms. Mburu for Respondent

N/A for State/Appellant

Nyalo – court clerk.